

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 432 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

PALA MADAN AHER

Versus

JIVA BHAGWAN AHER

Appearance:

MR SHIRISH JOSHI for Petitioner

MR JITENDRA M PATEL for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 10/03/2000

ORAL JUDGEMENT

1. The present respondent filed a Regular Civil Suit
No. 220 of 1977 in the court of Civil Judge (JD) at
Kodinar stating that he is the owner and occupant of
house situated in village Vadnagar, taluka Kodinar, as

described with the boundaries in the plaint. It was the case of the plaintiff that on western portion of his house there was an open land and on or about 20th January, 1977 the present appellant i.e. the original defendant illegally encroached upon this wada land and he has constructed a 'Dhalia'. Therefore, the suit was filed for the removal of that Dhalia and declaration of ownership over the suit wada and for its possession. The suit was contested by the present appellant taking pleas that since ancestral times he is enjoying this wada land and dhalia. He denied the case of the plaintiff in toto and pleaded that he is the owner of the wada land and dhalia and he enjoys the possession of suit wada and dhalia since long with the knowledge of the plaintiff and his predecessor in title and hence he has become the owner of that land by virtue of the adverse possession. The plaintiff has stated that this property was purchased by him vide sale deed dated 17th April, 1946 from one Parshottam Vallabhji.

2. After full fledged trial, the trial judge was pleased to decree the suit in favour of the plaintiff passing a decree against the present appellant to vacate the suit land and Appeal being Regular Appeal No. 32 of 1980 was preferred by the present appellant before the District Judge, Amreli, which also came to be rejected and hence being aggrieved, this Second Appeal is filed by the original defendant against the judgment of both the lower courts.

3. Both the lower courts placed reliance on wada patrak at Exh. 19, document of sale, by which the plaintiff purchased the land, which is at Exh. 18, and the deposition of Circle Inspector Vrundavan at Exh.35 and came to the conclusion that the disputed wada land was owned by the plaintiff, which was encroached upon by the defendant.

4. On filing of this Second Appeal, the following substantial question of law was framed by this court :

"Whether the evidence of the Surveyor can led to the proof of encroachment"?

5. Regarding this, learned advocate Mr. B.S. Joshi for Mr. Sunil S. Joshi has vehemently argued that the evidence of the Circle Inspector must be discarded because the map and measurement is taken in absence of the defendant and contrary to Sec. 37 of the Bombay Land Revenue Code. Learned Advocate Mr. Joshi further argued that the Exh.18 document by which the plaintiff has

purchased the property describes the measurement of property in yards while Circle Inspector (Exh.35) has measured the property in feet and, therefore, it is not tallying with the document nor any explanation is given by the plaintiff that the measurement described in Exh.18 tallies with the measurement taken by the Circle Inspector - Exh.35. It was also urged that the Circle Inspector has deposed that no map of any land of the village was prepared and, therefore, in absence of adjoining map, the surveyor or the Circle Inspector could not have taken the correct measurement of the disputed property, and hence this evidence could not be believed. Further it was also argued that the Surveyor and the Circle Inspector has taken into consideration the wada patrak, but the wada patrak is not reliable evidence because the same is not kept according to any statutory provisions. Therefore, on this count, it was urged that the appeal be allowed and the findings of the trial as well as first appellate court be set aside and suit be dismissed.

6. As against that, learned Advocate Advocate Mr. T.J. Patel for J.M. Patel for the respondent has supported the concurrent findings of facts of both the courts below.

7. Dealing with the contentions raised on behalf of the appellant, Exh. 19 certified copy of Wada Patrak is material and be taken into consideration. Merely because this wada patrak is not kept in pursuance of any statutory provisions, the same cannot be discarded. Both the courts below have placed heavy reliance on that document. The cogent aspect would be whether any weight can be attached to the document produced in the court. It may or may not be material that those documents are kept in pursuance of any statutory provisions. Now, Exh.19 wada patrak is of Samavant Year 1974. The property mentioned in this wada patrak is undoubtedly the suit property because the four boundaries are mentioned in that wada patrak tallies with the suit property. Owner of that property has been shown as Meraman Govind. The measurement of the property is mentioned to be 102 sq. yards. Now, it is the case of the plaintiff that Purshottam Vallabh, from whom the plaintiff has purchased the suit property had purchased this property from Meraman Govind. This case has been established by the plaintiff that the original owner of that property was one Meraman Govind, and that property was purchased by Purshottam Vallabh and then the plaintiff purchased the suit property from the said Purshottam Vallabh as back as in the year 1946 by sale deed - Exh.18. The measurement

of this property is mentioned as 102 sq. yards in Exh. 19 Wada patrak. There is no allegation at all that this wada patrak has been forged or fabricated. The courts below have rightly placed reliance on these documents. This being the question of fact now said to have been finally decided between the parties. Now it cannot be held that the courts below have wrongly placed reliance on Exh.18 and 19. Now, with this background, if the evidence of Circle Inspector - Exh.35 is appreciated, it is clear that suit wada land includes 102 sq.yards. The Circle Inspector has produced the map, he has taken the measurement in feet, but the Circle Inspector has not been confronted with the case that the measurement taken in feet does not tally with the measurement shown in the wada patrak Exh.19. If other wise also the evidence of the Circle Inspector is appreciated from the view points of preponderance of probabilities, it is an established fact that the suit wada land is a part of the house of the plaintiff. It is not the case of any party that after the purchase of the house by the plaintiff, he has made any alteration in the construction. 80% of the property appears to have been covered by the construction and 20% appears to be the open land and in this local situation, the question of error of measurement on account of absence of maps of adjoining site, maps for the other properties, would not arise at all. Even if the measurement and the maps are prepared in the absence of the defendant, the question is whether the evidence of Circle Inspector would inspire any confidence and from the record it is clear that both the courts below have placed reliance on this evidence. There is no provision in the Bombay Land Revenue Code or any other law that if any Circle Inspector draws the panchnama or takes the measurement in the absence of the party, his evidence in any court would not be admissible. Courts are not barred by any provision to appreciate such evidence and after appreciating that evidence, it is clear that this evidence inspires the confidence. In this view of the matter, the substantial question of law is replied that the evidence of the Circle Inspector certainly leads to prove of encroachment by the defendant. In these circumstances, the Second Appeal fails and the following order is passed:

" Appeal is dismissed with no order as to costs.

However, at the request of the learned advocate for the appellant, the time is granted upto 18th May, 2000 to the appellant to vacate the premises and no further time shall be granted in this regard" .

p.n.nair